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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JEFF SHELTON, Plaintiff and Appellant, v. CITY OF LOS ANGELES BOARD OF CIVIL SERVICE COMMISSIONERS, Defendant; CITY OF LOS ANGELES, Real Party in Interest and Respondent.	B289232 (Los Angeles County Super. Ct. No. BS166541)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary Strobel, Judge. Affirmed.

Castillo Harper, Michael A. Morguess, and Joseph N. Bolander for Plaintiff and Appellant Jeff Shelton.

Christina L. Checel for Real Party in Interest and Respondent City of Los Angeles.

The City of Los Angeles (the City) discharged Jeff Shelton from his position as a sergeant with the Airport Police Division of the Los Angeles World Airports (LAWA). Shelton appealed to the City's Board of Civil Service Commissioners (the Board), which upheld the City's decision. Shelton then filed in the superior court a petition for writ of administrative mandate compelling the Board to set aside its decision and directing the City to reinstate his employment, among other relief. The court denied the petition and Shelton timely appealed. We affirm.

FACTS AND PROCEEDINGS

A. *LAWA Internal Affairs Case No. 13-156*

In November 2013, Shelton was one of two supervising sergeants in the emergency services unit (ESU) of LAWA. He supervised the ESU's red team; the other supervisor, Sergeant Troy Takaki, supervised the blue team. Officer J.A. was a member of the blue team.

The two ESU teams worked different days of the week, except that everyone worked on Wednesdays when they would hold meetings and conduct training sessions. During the meetings, the ESU team members would discuss and critique each other's actions during training sessions.

On Friday, November 1, 2013, a gunman entered Terminal 3 of the Los Angeles International Airport and shot and killed a Transportation Security Administration (TSA) agent. The assailant shot the agent near the bottom of a set of stairs and escalators, then went up the escalator into the terminal. Although the ESU's blue team was on duty that day, Sergeant Takaki was away at a training class and Shelton was the sergeant in charge. Shelton, J.A., and the other ESU officers responded to the active shooter situation.

After the shooter was shot and captured, Shelton used his personal cellular phone to take pictures of the gunman and his weapon. J.A. also photographed the injured assailant and sent the photograph via his cellular phone to Shelton. Shelton did not send the pictures to crime scene investigators. Instead, he sent them to two officers with the Los Angeles Police Department who were not involved in the investigation.

Within a few days after the shooting incident, Shelton asked an officer who had access to a video recording of the incident to copy the recording for him to use for training purposes. When the officer was unable to transfer the recording electronically, he played the video on a computer monitor as Shelton used his personal cellular telephone to record the video as it played.[1] As Shelton recorded the video, he spoke with the other officer and did not watch the video in its entirety.

Shelton then walked into the ESU office and showed the video to six ESU officers, including J.A. Prior to seeing the recording, ESU officers had not known what J.A. did during the incident. The video showed the lobby area of Terminal 3 and the passenger screening area where the TSA agent was shot. After other law enforcement officers arrived on the scene, J.A. appeared, suited up in full gear, walked into the terminal and, instead of going upstairs "towards the threat" as trained, remained near the

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[1] According to the LAWA Assistant Chief of Homeland Security, Shelton was not authorized to possess the video recording or to share it with others. Shelton testified that he believed at the time he recorded the video that he was authorized to make the recording. At the hearing before the Board's hearing examiner, however, he conceded that he was not authorized to do so.

bottom of the stairs. Among the officers watching the video, J.A.'s actions evoked a silent but palpable uneasiness.[2]

Shelton thereafter showed the video or sent it electronically to several other officers on various occasions.

There is conflicting evidence of derogatory comments about J.A. in the aftermath of the Terminal 3 incident. According to Officer Blaha, during a break in a training class a few days after the shooting, Shelton showed Blaha the video of J.A.'s response and referred to "Private Upham," a cowardly character in the movie Saving Private Ryan (DreamWorks Pictures and Paramount Pictures 1998). Blaha responded, "It's more like Lieutenant Dike from *Band of Brothers*." (Italics added.) (Lieutenant Dike is depicted in the television show *Band of Brothers* as a soldier who exhibited cowardice in battle.) Blaha also testified that Shelton referred to J.A. at that time as "chicken shit." Later that day, Shelton texted to Blaha a picture of Private Upham.

Shelton denied that he referred to J.A. as Private Upham, or that he had made any derogatory or demeaning comments about J.A. on the occasions when he showed the video to others. According to Shelton, he overhead Blaha say to J.A. during a training session: " 'Hey, Lieutenant Dike, what happened? Why didn't you go upstairs.' " In response, Shelton told Blaha, "Rich, not cool."

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[2] Shelton and another officer testified that Shelton did not make any comment about J.A.'s response when the video was first shown. J.A. testified that Shelton questioned him about why he grabbed his gear before entering the terminal and why he had not gone upstairs. J.A. did not, however, consider Shelton's comments to be demeaning toward him.

J.A. testified that he was aware of a "Lieutenant Dike comment," but could not remember who made it, what was said, when it was made, or whether Shelton was present when it was made.[3]

Sergeant Takaki testified that Shelton had called J.A. a "poser" and had described J.A. as "[p]laying the part" of a SWAT officer, but Takaki could not be certain whether Shelton made these statements after the Terminal 3 incident. Officer Chow testified that during a team meeting in December 2013, Shelton said to J.A. in a voice loud enough for everyone to hear, " 'I always knew you were a poser with your mustache and your Oakleys.' " Shelton denied calling J.A. a poser and said that others used that term. He did, however, concede that he "might have" expressed agreement with another officer's description of J.A. as a poser. He also testified that the video may have "solidified" the opinion by some ESU officers that J.A. was a "poser."

At some point, Shelton met with Takaki and showed him the video. Shelton told Takaki that J.A.'s response "wasn't what he thought ESU response should be," and Takaki agreed that J.A.'s response was inappropriate. Shelton asked Takaki to "handle the situation" and talk to J.A. about leaving the team.

Takaki met with J.A. and explained to him that other team members could have reservations about trusting J.A. in a future incident, and "there might be an issue with him remaining on the team." According to J.A., Takaki also told him that Shelton thought he should leave the unit. J.A. told Takaki that he did not want to leave, but would consider leaving the team.

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[3] At some point, Blaha told J.A. that he had made the Lieutenant Dike comment and apologized for doing so.

After his meeting with J.A., Takaki spoke with Shelton. According to Takaki, he told Shelton that he "thought [J.A.] would leave or that he may be leaving." According to Shelton, Takaki told him that "[J.A.] did say he was going to leave, but he preferred staying, but he will leave if it's best for the team." Shelton understood Takaki to mean that J.A. had agreed to leave the team.

On November 17, 2013, after his meeting with Takaki, Shelton sent an email to his superior officer, Lieutenant Richard Rios, concerning the hiring of officers for the ESU. The email included the statement: "[J.A.] has chosen to leave for very personal and private reasons." Rios responded to Shelton by email, saying that he would address the matter soon. The next day, Shelton forwarded Rios's response together with his original email to some of the ESU officers, but not J.A.

Ethel McGuire, LAWA's Assistant Chief of Police, received a copy of Shelton's email and forwarded it to J.A., who was surprised by Shelton's statement about him because he had not decided to leave the unit at that time. McGuire asked J.A. about the statement, and J.A. told her that he did not want to leave, but felt "uncomfortable staying based on what everyone [was] saying about [him]." McGuire persuaded J.A. to remain with the unit.

During a Wednesday meeting of all ESU members, J.A. explained his actions during the Terminal 3 incident by stating that, by the time he arrived at the terminal, he had heard that a shooter was down and that there might have been a second shooter. After J.A. spoke, Shelton challenged J.A.'s explanation and told

him, "[C]ome over and look at what you did." Shelton then showed the video to everyone present.[4]

During the meeting, Shelton told J.A.: "Unfortunately, [J.A.], in this case, you didn't do what we trained for." According to Shelton, the other members at the meeting, with the exception of Blaha, said that J.A. had acted inappropriately. Sergeant Takaki said he was disappointed in J.A.'s response and, according to other officers, voiced concern about J.A.'s trustworthiness in a future active shooter situation and expressed words to the effect that "it might be time [for J.A.] to go."

According to Shelton, Blaha said that J.A. " 'did the right thing.' " Shelton responded to Blaha by saying: "You called him Lieutenant Dike a few days ago but now you're praising him." Shelton then left the room. According to J.A., Shelton got upset after J.A.'s explanation, raised his hands and said, " 'I can't believe this,' " and walked out. J.A. testified that Shelton's conduct at the meeting demeaned and humiliated him, and he believed that Shelton's showing of the video at the meeting was done to depict him in a derogatory way.

In February 2014, Shelton was transferred out of the ESU to a patrol unit and soon afterward began a disability-related leave of absence due to anxiety and depression.

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[4] It is not clear from our record when the Wednesday meeting at which J.A. explained his actions occurred, or whether it occurred before the meetings between Shelton and Takaki concerning J.A.'s response or Takaki's meeting with J.A. J.A. believed his meeting with Takaki occurred before the Wednesday meeting.

B. *LAWA Internal Affairs Case No. 14-189*

In 2013 and 2014, Lieutenant Rios was in charge of the ESU and was Shelton's supervisor. During that time, their relationship became increasingly acrimonious. At some point, Shelton filed a complaint with LAWA's internal affairs unit alleging that Rios, a member of the California State Military Reserve, had misused military leave time. The internal affairs unit determined that the allegations were unfounded or "not sustained." Shelton subsequently prompted an investigation by the Los Angeles County District Attorney's Office based on similar allegations; the district attorney declined to file any charges.

In early 2014, Chief Gannon authorized Rios to speak at an airport security symposium hosted by the Ontario, Canada Provincial Police Department. On August 17, 2014, Shelton sent an anonymous email to a Canadian police officer who Shelton believed was responsible for "vetting" speakers for the Canadian airport police symposium. The message stated: "I work for the Los Angeles Airport Police and have known [Lieutenant] Robert Rios for quite some time. He is a liar and a fraud of the highest order. [¶] He is currently being investigated by the [Los Angeles County] DA's Integrity Division for felony fraud of military leave funds. He is not part of the National Guard, as he claims, but merely an unpaid volunteer for the California State Military Reserve, a gaggle of weekend warriors who typically decide in their 50's and 60's to do something military-esque for a tiny portion of their lives. Though this particular outfit only 'drills' once a month for 8 hours on a Saturday, Rios routinely took 5 days a month of military leave, paid for by the City, a behavior which immediately ceased upon this behavior coming to light. Stand by for a story by the [Los Angeles] Times as Rios is currently being sued for retaliating against one of his subordinates for reporting his crimes. [¶] Please, Rios is a fraud,

liar and tyrant unlike any you have known, forced to leave the United States to successfully masquerade as a respected authority on anything. He is a disgrace to law enforcement and military everywhere. He claims to have been an MP for the USAF but was merely a private security guard on a base in Southern California. You mustn't allow him to speak at your symposium. [¶] Thank you. [¶] ED."[5]

Shelton did not receive a response to the email message. One month later, on September 17, 2014, Shelton left the following voicemail message on the Canadian police officer's phone: "Hi, Detective. I'm actually calling about one of the speakers at your upcoming symposium. (Unintelligible) obligated to let you know that [Lieutenant] Robert Rios is actually being investigated for felony charges for fraud of military leave funds. [¶] He's not actually military. He often takes military leave when he doesn't have any military duties. So he's being investigated by the district attorney for that by the Fraud Division. [¶] He was never US Air Force, military police. He was private security, and he's—there's a host of other things, bad things, about this guy. You can Google him. But, yeah, if you need to give me a call, call me at [redacted]. [¶] Again, this is about [Lieutenant] Robert Rios. He's a bad dude, and it might bring a negative light on your symposium, and I'd hate for that to happen. [¶] Thank you very much." The phone number Shelton provided belonged to his wife.

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[5] Shelton explained that "ED" are the initials of Edmond Dantes, a character in the novel "The Count of Monte Cristo." (Dumas, The Count of Monte Cristo (1844).) Shelton used the name as a "nom de plume" to conceal his identity.

Shelton testified that at the time he sent the email and left the voicemail message he was on a leave of absence for depression and was "heavily medicated."

PROCEDURAL HISTORY

On November 13, 2014, the City served on Shelton a notice of disciplinary action in LAWA internal affairs case No. 13-156, setting forth eight allegations, including the following two that are relevant here: (1) Shelton violated LAWA Administrative Manual section 5.020.I.2, which prohibits employees from "[d]emonstrating insensitivity to others by making derogatory comments, epithets, jokes, teasing, remarks, or slurs, or making suggestive gestures or displaying images or written material that derogatorily depict or demean people" (the J.A. allegation); and (2) Shelton violated section 5.020.B.1 of the LAWA Administrative Manual and section 5/8.21 of the LAWA Manual, which require LAWA officers to safeguard "Sensitive Security Information" (SSI) as defined in federal regulations (the SSI allegation). The J.A. allegation was based on Shelton's use of the ESU response video and his statements regarding J.A.'s response to the Terminal 3 incident; the second was based upon Shelton's handling of the ESU response video and of the photographs he and J.A. took of the crime scene.

On February 25, 2015, a *Skelly*[6] hearing was held in LAWA internal affairs case No. 13-156. LAWA's Chief of Police, Paul Gannon, sustained four of the eight allegations against Shelton, including the two cited above, and determined that other allegations were not sustained. Chief Gannon determined that the appropriate penalty was termination of Shelton's employment. He explained that Shelton was "irresponsible" when he showed

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[6] *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194.

the ESU response video to ESU officers "without first viewing the video to ensure it was appropriate for a group setting. By doing this, [Shelton] ultimately created a scenario which shined a negative light on [J.A.]"[7] Shelton's actions, Chief Gannon concluded, "whether intentional or unintentional were the cause of all the negative attention . . . focused on [J.A.]"

On May 21, 2015, prior to the final decision regarding LAWA internal affairs case No. 13-156, the City issued a second notice of disciplinary action (LAWA internal affairs case No. 14-189), which included three allegations arising from Shelton's email and voicemail about Lieutenant Rios and the Canadian airport police symposium. The notice alleges in part: (1) Shelton "sent an inappropriate email and left a derogatory message . . . in an effort to discredit . . . Rios"; and (2) the email and voicemail message violated the department's policy against "[d]emonstrating insensitivity." After a *Skelly* hearing held on July 9, 2015, Chief Gannon sustained these allegations and determined the penalty to be termination of employment.

The City discharged Shelton on August 14, 2015, based on the findings in both case No. 13-156 and case No. 14-189. Shelton appealed the discharge to the Board. Evidentiary hearings were

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[7] Chief Gannon explained further at the Board hearing: As a supervisor, "if you have [a] problem with what somebody does . . . , you counsel or you discipline in private. [¶] And you take that individual aside. That's what should have been done. And if you had a problem with what [J.A.] did, you have to talk to him about it, pull him aside, get his side of what occurred. And then if it is appropriate to show that to other people, then you could show it. [¶] But the way in which it was done, it was done haphazardly. It . . . was not done in a way that I would expect a supervisor to act."

held before a Board hearing examiner in late 2017 and early 2018. The hearing examiner recommended that the Board sustain each allegation.

After reviewing the hearing examiner's report and hearing further argument, the Board sustained the allegations that are challenged in the instant appeal.

On December 5, 2016, Shelton filed a petition for writ of administrative mandate in the superior court pursuant to Code of Civil Procedure section 1094.5.[8] The court held a hearing on the petition on January 4, 2018. On February 2, 2018, the court denied the petition and, on February 26, entered judgment in accordance with its ruling. Shelton appealed.

STANDARDS OF REVIEW

When a petition for writ of administrative mandate challenges an agency's decision affecting a fundamental right, the trial court must exercise its independent judgment to determine whether the agency's findings are supported by the weight of the evidence. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143, fn. 10; *Cassidy v. California Bd. of Accountancy* (2013) 220 Cal.App.4th 620, 626.) A decision terminating a police officer's employment affects such a fundamental right. (*Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 658; *Wences v. City of Los Angeles*

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[8] Shelton did not challenge in the trial court, and does not challenge on appeal, two allegations in LAWA internal affairs case No. 13-156 that were sustained after his *Skelly* hearing and his appeal to the Board. These allegations arise from (1) Shelton's taking of crime scene pictures and his failure to turn over the pictures and the video to crime scene investigators, and (2) his failure to take corrective action against J.A. for sending to him the photograph J.A. took of the crime scene.

(2009) 177 Cal.App.4th 305, 314.) "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.)

On appeal from the trial court's decision, when, as here, the administrative decision affects a fundamental right triggering the trial court's duty to exercise its independent judgment, a reviewing "court must sustain the trial court's factual findings if substantial evidence supports them, resolving all conflicts in favor of the prevailing party, and giving that party the benefit of every reasonable inference in support of the judgment." (*Flippin v. Los Angeles City Bd. of Civil Service Commissioners* (2007) 148 Cal.App.4th 272, 279.) We independently determine issues of law related to the administrative decision, such as interpretation of statutes and regulations. (*Hoitt v. Department of Rehabilitation* (2012) 207 Cal.App.4th 513, 522; *Sulla v. Board of Registered Nursing* (2012) 205 Cal.App.4th 1195, 1200.)

DISCUSSION

I. The Evidence Is Sufficient to Support the J.A. Allegation Findings

The trial court concluded that the weight of the evidence supported the Board's finding that Shelton "demonstrated insensitivity to Officer [J.A.] by making derogatory remarks and displaying images that derogatorily depicted him." Shelton argues that the evidence is insufficient to support this finding. We disagree.

Shelton challenges the court's reliance on the testimony by Officers Blaha and Chow that Shelton had made derogatory comments about J.A. Blaha testified that Shelton compared J.A. to the cowardly character, Private Upham, and called him "chicken shit." Chow testified that Shelton called J.A. a "poser with [his] mustache and [his] Oakleys." Shelton acknowledges that such testimony "has the potential to constitute substantial evidence," but points to the lack of corroboration for these statements and Blaha's and Chow's failure to mention such statements when interviewed during the internal affairs process.

Even if we accept Shelton's arguments regarding Blaha's and Chow's testimony, Shelton ignores the evidence of the manner of showing the video recording. Indeed, this is the evidence that Chief Gannon relied on in sustaining the allegation at the *Skelly* stage. By showing the video to ESU officers without previewing it, Chief Gannon explained, Shelton "opened the door for [J.A.] to be ridiculed for his actions." "Shelton's responsibility was to review the footage prior to showcasing it in an open forum to ensure that it was appropriate for viewing by his subordinates. If he would have viewed the footage prior to showing it, [J.A.]'s actions could have been addressed in a private setting at a supervisory level."

Gannon reiterated these explanations before the hearing examiner. The evidence that Shelton showed or sent the video to several individuals outside of training contexts and played it at a Wednesday meeting to discredit J.A.'s explanation further supports the allegation that he displayed insensitivity toward J.A. The trial court's finding regarding the J.A. allegation is thus supported by substantial evidence.

II. The Trial Court's Discussion of Shelton's Intent Does Not Require Reversal

Shelton contends that the trial court erred by basing its decision to sustain the finding on the J.A. allegation on facts outside the scope of the disciplinary allegations. In particular, he argues that the court "echo[ed]" and adopted the hearing examiner's finding that Shelton's "true agenda was to get rid of [J.A.]" This was error, he asserts, because Shelton "was not charged with purposefully seeing to [J.A.]'s exit." He could not, therefore, be disciplined based on that fact. Stated differently, the J.A. allegation cannot be sustained based upon evidence that he wanted to get rid of J.A.

Shelton is correct that his intent in showing the video to others and in making the comments that supported the J.A. allegation is not an element of that charge; the City was not required to prove that he wanted to "get rid of [J.A.]" We reject his argument, however, because the court did not base its decision on the fact that Shelton wanted to get rid of J.A.; the court based its decision on its determination that "the weight of the evidence supports the finding that [Shelton] demonstrated insensitivity to Officer [J.A.] by making derogatory remarks and displaying images that derogatorily depicted him." That decision, as explained in part I, *ante*, is supported by substantial evidence. The court's

arguably superfluous discussion regarding Shelton's intent does not negate that evidence or otherwise require reversal.

III. The City Was Not Required to Show That Shelton Pressured J.A. to Leave the ESU

Shelton argues that, even if he demonstrated insensitivity toward J.A., the issue is whether that "insensitivity . . . is responsible for [J.A.]'s perception [that] 'he no longer wanted to be assigned to the unit due to comments that were made toward him.' " Sergeant Takaki, he contends, had the "prominent role" in shaping that perception, and it was Takaki, not Shelton, who spoke harshly of J.A. during the Wednesday team meeting where J.A. explained his actions. The court erred, Shelton concludes, by failing to give the appropriate weight to the evidence of Takaki's responsibility for J.A.'s perception.

Neither the J.A. allegation nor the pertinent disciplinary standard require any showing that Shelton's actions had any effect on J.A. The allegation, which mirrors the disciplinary standard upon which it is based, states that Shelton "[d]emonstrat[ed] insensitivity to others by making derogatory comments, epithets, jokes, teasing, remarks, or slurs, or making suggestive gestures or displaying images or written material that derogatorily depict or demean people." The City was not required to prove that Shelton's insensitivity or derogatory comments caused J.A. to consider leaving the ESU.[9] We therefore reject Shelton's argument.

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[9] Even if the City was required to prove that Shelton's conduct had an impact on J.A., that requirement was met by J.A.'s testimony that he felt demeaned and humiliated by Shelton's actions at the meeting where J.A. explained his response to the Terminal 3 incident.

IV. The Trial Court Applied the Independent Judgment Standard to Chow's and Blaha's Testimony

Shelton further contends that the trial court failed to exercise its independent judgment and reweigh the evidence concerning testimony by Officer Chow and Officer Blaha. Chow and Blaha, he contends, made statements before the Board's examiner hearing that were inconsistent with statements they made to internal affairs investigators. Chow, for example, testified at the hearing that Shelton called J.A. a poser during a team meeting in December 2013. On cross-examination, Shelton's counsel elicited from Chow that he had previously answered, "no," when internal affairs investigators asked the following two questions: "When you came back [from vacation in early December], was there any discussions going on pertaining to anybody and how they responded to the November 1st incident?"; and "Were there any comments about [J.A.] and his actions on November 1st?"

Regarding Blaha, Shelton refers to Blaha's testimony before the hearing examiner that Shelton, after showing the ESU response video, made a reference to Private Upham, and that Blaha responded, "It's more like Lieutenant Dike from *Band of Brothers*." (Italics added.) In his internal affairs interviews, Blaha stated that he had heard "jokes" that J.A. had "acted like Lieutenant Dike," and denied that he called J.A. Lieutenant Dike directly. The internal affairs interviewers did not ask Blaha, and Blaha did not say, whether, when speaking with Shelton, he compared J.A. to Lieutenant Dike.

The trial court found "insufficient reason to question Officer Chow's credibility" with respect to his testimony that Shelton called J.A. a "poser" at a Wednesday meeting. The court also dismissed Shelton's claim about "perceived inconsistencies" in Blaha's testimony because the "important testimony from Blaha is

that [Shelton] made the Private Upham statement, and allowed such remarks about [J.A.] to be made."

We disagree with Shelton that the trial court failed to exercise its independent judgment in evaluating Chow's and Blaha's testimony. The court's analysis reflects its review of the evidence without any more deference to the hearing examiner than that which was due. (See *Fukuda v. City of Angels*, *supra*, 20 Cal.4th at p. 817 [court evaluating an administrative mandate petition exercises independent judgment while affording a strong presumption of correctness concerning the administrative findings].) In any event, as explained above, there is sufficient evidence to support the J.A. allegation without relying on Chow's and Blaha's arguably inconsistent testimony, and Shelton has failed to explain how the trial court's alleged error was prejudicial.

V. The SSI Allegation Was Properly Sustained

In the SSI allegation, the City alleged that Shelton's showing of the Terminal 3 incident response video and his disclosure of crime scene photographs violated his duty to safeguard SSI as defined in TSA regulations. The TSA regulations define SSI as "information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would . . . [b]e detrimental to the security of transportation." (49 C.F.R. § 1520.5(a) (2019).) SSI also includes: "Details of any security inspection or investigation of an alleged violation of aviation . . . transportation security requirements of Federal law that could reveal a security vulnerability." (49 C.F.R. § 1520.5(b)(6)(i) (2019).)

In sustaining the SSI allegation at the *Skelly* stage, Chief Gannon explained that "[v]ideo footage of a crime that occurred and resulted in the loss of life is classified as Security Sensitive

Information." At the hearing before the Board's hearing examiner, Assistant Chief McGuire testified that SSI includes "anything that disclose[s] security aspects of the airport," and anything that "shows the doors and cameras, any of the internal security mechanism[s] that we operate." The video, she explained further, showed ESU officers running through a passenger screening area, which is "considered SSI."

Based on Chief Gannon's and Assistant Chief McGuire's testimony and other evidence, the hearing examiner recommended the SSI allegation be sustained, and the Board agreed. In denying Shelton's writ petition, the trial court determined that the weight of the evidence supported the finding that Shelton "failed to safeguard SSI." Shelton contends that this conclusion is error. We disagree.

The Terminal 3 incident response video indicated the location of the security camera that recorded the shooting of the TSA agent and showed how ESU and other law enforcement officers responded to the incident. LAWA could, as it did, reasonably deem the camera's location (inferable from the video) and the nature and manner of law enforcement's response as SSI. Shelton's unauthorized disclosure of such information by showing and sending the video to others is thus a breach of his duty to safeguard the information. We therefore reject Shelton's argument.

VI. There Is No Error in the Court's Credibility Findings Regarding Shelton

The hearing examiner found that Shelton "had serious credibility issues" based on inconsistent testimony and his conduct at the hearing. Shelton argued to the trial court that such credibility findings were not supported by the evidence. The trial court disagreed, stating that there was "no prejudicial abuse of discretion in the hearing officer's credibility findings." On appeal, Shelton argues that the trial court's "findings concerning Shelton's

credibility are not supported by substantial evidence, irrelevant, and outside the scope of the [proceeding]." We find no error.

Shelton's credibility was indisputably an issue in the case, particularly as to areas where his testimony conflicted with other evidence. (*Susan S. v. Israels* (1997) 55 Cal.App.4th 1290, 1297 ["a witness's credibility is always in issue"].) We therefore reject Shelton's contention that credibility findings were irrelevant or beyond the scope of the proceeding.

As for the merits of the hearing examiner's credibility findings, which were based in part on Shelton's demeanor and attitude during the hearing, we have no power to reject them. It is well-settled that " ' "it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." ' " (*People v. Maciel* (2013) 57 Cal.4th 482, 519.) Shelton cites no contrary authority.

VII. Shelton's Email and Voicemail Regarding Lieutenant Rios Were Not Protected Speech

The allegations supporting disciplinary action in LAWA case No. 14-189 are based upon Shelton's email and voicemail regarding Rios's participation at an Ontario, Canada airport security symposium. Shelton admitted sending the email and leaving the voicemail message, and does not, on appeal, challenge the finding that he made the communications in an effort to discredit Rios. Shelton contends, however, that he cannot be disciplined based upon the email and voicemail messages because the communications are protected under the First Amendment's guarantee of free speech. We reject the contention.

A "[s]tate cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." (*Connick v. Myers* (1983) 461 U.S. 138, 142

(*Connick*).) To determine whether a public employee's speech is thus protected, courts engage in a two-stage inquiry. First, the court determines "whether the employee spoke as a citizen on a matter of public concern"; "[i]f the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." (*Garcetti v. Ceballos* (2006) 547 U.S. 410, 418 (*Garcetti*).)

The first step—determining whether the employee's speech addresses a matter of public concern—"must be determined by the content, form, and context of a given statement, as revealed by the whole record." (*Connick*, *supra*, 461 U.S. at pp. 147–148.) If the court reaches the second step, it evaluates "the government's interest in allaying disruption and inefficiencies in the workplace" by considering "(1) 'the time, place, and manner of the employee's speech,' and (2) 'the employer's motivation in making the adverse employment decision.' " (*Decotiis v. Whittemore* (1st Cir. 2011) 635 F.3d 22, 35.)

The content of a statement addresses a matter of public concern only if it involves " 'issues about which information is needed or appropriate to enable the members of society to make informed decisions about the operation of their government.' " (*Desrochers v. City of San Bernardino* (9th Cir. 2009) 572 F.3d 703, 710.) By contrast, " 'speech that deals with "individual personnel disputes and grievances" and that would be of "no relevance to the public's evaluation of the performance of governmental agencies" is generally not of "public concern." ' " (*Ibid*.)

Here, the trial court concluded that the content, form, and context of the challenged speech weighed in favor of finding that

Shelton's statements did not address a matter of public concern. The court went on to conclude that the "restrictions on [Shelton's] speech . . . were justified because the speech had potential to affect the entity's operations." Because the facts are undisputed, the issue is one of law, which we review de novo. (*Connick*, *supra*, 461 U.S. at pp. 148, 150, fns. 7, 10; *Chico Police Officers' Assn. v. City of Chico* (1991) 232 Cal.App.3d 635, 643.)

The content of Shelton's email and voicemail message is focused on Rios's character: Rios, Shelton asserted, "is a liar and a fraud of the highest order," "a fraud, liar and tyrant," and "a disgrace to law enforcement and military everywhere." Shelton supports these opinions with the fact that Rios was the subject of an investigation by the Los Angeles County District Attorney based upon Shelton's allegations of fraudulent use of military leave (which had been investigated and rejected by LAWA's internal affairs unit). Although, as the trial court found, it is Shelton's "personal feelings about [Lieutenant] Rios that resonate" in his messages, the assertions, even if ultimately unfounded, that a police lieutenant has the character flaws Shelton described arguably relate to a " 'matter of political, social, or other concern to the community' " deserving of constitutional protection. (See *Roe v. City and County of San Francisco* (1997) 109 F.3d 578, 585.)

But even if the content of the messages might warrant constitutional protection in some context, the form and context of Shelton's messages preclude such protection here. Significantly, Shelton did not express his views in the challenged messages to the public generally where they might have enabled members of society to make informed decisions about the operation of LAWA. Shelton did not, as he testified, "put [the information] on social media" or send it "to the entire department." Rather, he expressed them in semi-anonymous messages to one person in a foreign

country for a specific purpose: to have Rios excluded as a speaker at one event. Shelton even hoped that the desired exclusion of Rios would not be publicized. As he explained: "I hoped to achieve a quiet dismissal of Rios from this symposium. I was hoping that this detective in Canada, outside the country, would say, 'Hey, Rob [Rios], we appreciate you coming last year, but we're good this year, we won't be needing you,' and that was it." Thus, regardless of the arguably protected content of his messages, Shelton's extremely narrow and foreign audience of one and his limited intent to obtain a "quiet dismissal" of Rios from a single speaking engagement compel the conclusion that Shelton was not speaking on matters of public concern. (See *Cochran v. City of Los Angeles* (9th Cir. 2000) 222 F.3d 1195, 1201 [police officers' unprotected statements were not "directed to the public so that it independently could assess the functioning of the police department"]; *Skaarup v. City of North Las Vegas* (9th Cir. 2003) 320 F.3d 1040, 1043 [although plaintiff's statements touched on a matter of public concern, they were not protected because plaintiff "spoke privately to two individuals; he made no effort either to address the allegations with his superiors or to make them public"].) We therefore reject Shelton's First Amendment argument. (See *Garcetti*, *supra*, 547 U.S. at p. 418 [when the employee was not speaking on a matter of public concern, "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech"].)

VIII. The Penalty of Discharge Was Not an Abuse of Discretion

Shelton contends that the City abused its discretion in imposing termination of employment as a penalty and that the trial court erred in upholding the penalty. We disagree.

The trial court reviews the Board's penalty for an abuse of discretion. (*Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 404; *Bautista v. County of Los Angeles* (2010) 190 Cal.App.4th 869, 879.) Such an abuse of discretion is shown " 'only in the exceptional case, when it is shown that reasonable minds cannot differ on the propriety of the penalty.' " (*Ibid.*) On appeal, we review the question independent of the trial court's determination and we apply the same abuse of discretion standard to the Board's decision. (*Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 47.)

LAWA's disciplinary policies expressly provide for the penalty of discharge when the offense is a second offense. The Board, in selecting the appropriate discipline, may also consider whether the employee has committed more than "one kind of offense at the same time" or "various kinds of offenses over a period of time."

The City based its decision to discharge Shelton in part on the fact that Shelton had been suspended for 10 days based upon nine sustained allegations arising from his harassment of two other LAWA officers, including sexual harassment of a female subordinate officer, in and around 2009. In the prior case, a hearing examiner found that, among other wrongful conduct, Shelton sent "vulgar, harassing and threatening" text messages to the subordinate. By sending such messages, Shelton "engaged in conduct unbecoming a peace officer" and "demonstrated insensitivity to others."

In the instant case, the hearing examiner concluded that Shelton had "apparently learned nothing from" the prior suspension. The hearing examiner also relied on Shelton's lack of credibility in his testimony, his "refus[al] to take responsibility for his actions," and Chief Gannon's testimony that discharge was the only "appropriate penalty" based upon "the Rios case," "the [J.A.] situation[,] and [Shelton's] previous discipline."

The sustained allegations involve at least four distinct types of offenses: Actions showing insensitivity toward J.A. in the aftermath of the Terminal 3 incident; failure to turn over photographs of the crime scene to investigators; failure to safeguard SSI by disclosing the video to others; and the efforts to discredit Rios in connection with the Canadian airport police symposium. Significantly, the offenses took place after Shelton was previously disciplined for harassment of other officers. Moreover, the efforts to discredit Rios took place while Shelton was under investigation for the J.A. allegations and the SSI allegation. In light of the nature of the sustained allegations, the various types of offenses, the timing of the offenses, and the prior harassment, the Board did not abuse its discretion by imposing the penalty of discharge.

DISPOSITION

The judgment is affirmed.

The City is entitled to recover its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LEIS, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.